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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. [redacted] 179

ATLAS SCRAPER AND ENGINEERING CO., a Corporation,
Petitioner,

vs.

HARRY A. PUESCHE, an Individual,
Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

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IN THE

Supreme Court of the United States

October Term, 1966.

No. 1361

Atlas Scraper and Engineering Co., a Corporation,

Petitioner,

vs.

Harry A. Pursche, an Individual,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

This case comes before this Court on a Petition by Atlas Scraper and Engineering Co., appellant below, for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 28, 1966.

Opinions Below.

The detailed list set forth on page 1 of the Petition is accurate except that it omits the citation of the second decision on Appeal, 357 F.2d 296, (CA 9, 1966) and also omits reference to the previous Petition for Writ of Certiorari, No. 124, filed May 19, 1962, that Petition having been denied by this Court on November 19, 1962, 371 U.S. 911, 9 L.ed.2d 170, Rehearing denied January 7, 1963, 371 U.S. 959, 9 L.ed.2d 507.

Jurisdiction.

Jurisdiction of this Court is admitted.

Questions Presented.

Questions (1) and (2) presented on page 2 of the Petition need not be decided because (a) there are no special and important reasons for deciding them, (b) because the Petitioner, adjudged guilty of Fraud, should not be permitted to use the Anti-Trust Laws to protect it in the exercise of that Fraud, and (c) because the Petitioner now seeks help from this Court on its own agreement with Respondent which Petitioner itself cancelled fourteen years ago.

Statement of the Case.

The "Statement of the Case" set forth in the Petition, pages 4-10, is so long that it tends to obscure rather than to delineate the salient features of this case which has now been pending since 1953.

Respondent Harry A. Pursche is a farmer, and an individual inventor. He raised truck garden crops in Southern California (R1-69).* He personally constructed five two-way plows of different sizes and used them himself (R1-70, 71) in his farming operations (R1-70-72). He made all five plows available to Petitioner for measurement and study; prior to that time Petitioner had never built a two-way plow, nor any kind of plow (R1-74). Petitioner and Respondent entered into a license agreement dated April 1, 1948 (R1-1645). Petitioner then began to build two-way plows under his license (R1-74). Effective July 13, 1952 Petitioner cancelled the license under Paragraph XIII thereof, unrelated to the so-called

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* "R1" designates the Record on the first Appeal, and "R2" designates the Record on the second Appeal.

"grant-back" provision of Paragraph IX. The first patents to issue on inventions which were the subject matter of that license were granted January 13, 1953 and Respondent Harry A. Pursche filed his Complaint against Petitioner Atlas Scraper and Engineering Co. for patent infringement on November 3, 1953 (R1-3). On March 31, 1953 Pursche entered into a non-exclusive royalty license agreement with International Harvester Company (R1-1659) relating to the Pursche patents, which agreement is still in force. On November 1, 1957, Atlas entered into an exclusive license agreement with its former employee, Roy L. Chandler (R1-1683) relating to the Chandler patents, and this exclusive license agreement was assigned to Pursche by order of the trial court prior to the second Appeal.

Reasons for Denying the Writ.

1. Fourteen years have elapsed since Petitioner cancelled its license agreement with Respondent effective July 13, 1952, which agreement contained the "grant-back" clause now challenged by Petitioner. Since that date Respondent has not been a party to any license agreement containing a "grant-back" clause of any type.

2. There is a total absence of any proof that the "grant-back" provision had any restrictive effect on the industry; there is no record of fixing prices, tie-in clauses, suppressing competition or monopolizing an industry.

3. In the language of the trial Court, "it would be odd indeed if Atlas, adjudged guilty of fraud, could use the Anti-trust laws to protect it in the exercise of that fraud. The Anti-trust laws were made to prevent fraud, not enhance and protect it." (R2-940)

ARGUMENT.

(A) The "Grant-Back" Clause Challenged By Petitioner.

The basis for the charge of violation of the Anti-Trust Laws, as urged by Petitioner, is the presence of the "grant-back" clause found in Paragraph IX of the Pursche-Atlas License Agreement (R1-1645) which was in existence only from April 3, 1948 to July 13, 1952. The pertinent portion of the language of that Paragraph IX reads as follows:

> "Atlas agrees, for itself and for its sub-licensees, to promptly and fully disclose to Pursche any and all inventions and improvements, modifications and betterments made, discovered or acquired by Atlas and/or its sub-licensees relating to the plow construction forming the subject matter of this agreement; and any and all such inventions, improvements, modifications and betterments upon the aforesaid plow construction made during the life of this agreement by or through the efforts of Atlas and/or its sub-licensees, or coming under the control of Atlas or its sub-licensees, shall belong to Pursche whether patentable or not and shall be properly assigned to Pursche by Atlas, free from any payment or compensation therefor, to the full extent of the interest of Atlas or its sub-licensees therein, and will be available to Atlas free from the payment of any additional or further royalty or compensation therefor; . . .
>
> "It is mutually understood and agreed that if any such inventions, improvements upon, attachments to, or modifications of the aforesaid identified inventions that may be made or acquired by Atlas while this agreement is in force and so assigned to Pursche are susceptible of use on devices not coming within the terms or scope of this agreement, Atlas shall

have and is hereby given a royalty free, non-revokable, non-exclusive right and license to use the same on other devices not coming within the terms or scope of this agreement."

The "plow construction forming the subject matter of this agreement" constituted two-way plows. Thus, Petitioner Atlas was required to assign two-way plow improvements to Respondent Pursche, but these improvements were to "be available to Atlas free from the payment of any additional or further royalty or compensation therefor." Respondent Pursche was to get title but Petitioner Atlas was to retain a free license to use the inventions on devices other than two-way plows, by reason of the last sentence of Paragraph IX.

(B) The Transparent-Wrap Case.

This "grant-back" provision in the short-lived Pursche-Atlas agreement is the same type of provision considered by this Court in *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, (1947) 329 U.S. 637, 91 L.ed. 563, and found not to be illegal per se. The pertinent portion of the language of the "grant-back" provision in this *Transparent-Wrap* case appears in the earlier opinion of the Court of Appeals for the Second Circuit (1946) 156 F.2d 198, at 199:

"'11. During the term of this license *all improvements to Transwrap Packaging Machines, or new inventions used or capable of use in connection therewith,* whether made by the Licensor or by the Licensee, shall be deemed included within the terms of this license, without any additional consideration, or license fee or royalty being due to the Licensor for the use thereof. It is understood and agreed, however, that the Licensor shall have the right to use, and license the use of, outside the several territories

covered by this License Agreement, any improvement or addition to Transwrap Packaging Machines or any new inventions connected with such machines and used in making and/or closing the package, but not those applying to the filling or to the contents of the package, made, owned or controlled by the Licensee, but such right to use and enjoy such Patents or inventions shall be exclusive only with regard to their use in Transwrap Packaging Machines and Licensee shall have the free right to use and enjoy them in all other fields and in all other kinds and types of machines without the payment of any royalty to Licensor for such use.' . . ." (Emphasis added)

Thus, Licensor Transwrap was to receive title but Licensee Stokes was to have a free license to use the inventions on devices other than Transwrap Packaging Machines. This situation is exactly parallel to that in the present case where Licensor Pursche was to receive title but Licensee Atlas was to have a free license to use the inventions on devices other than two-way plows.

In holding "the inclusion in the license of the condition requiring the Licensee to assign improvement patents is not per se illegal and unenforceable", this Court said, beginning at page 645:

"It is, of course, true that the monopoly which the licensor obtains when he acquires the improvement patents extends beyond the term of his basic patent. But as we have said, that is not creating by agreement a monopoly which the law otherwise would not sanction. The grant of the improvement patent itself creates the monopoly. On the facts of the present case the effect on the public interest would seem to be the same whether the licensee or the licensor owns the improvement patents . . . .

"We are quite aware of the possibilities of abuse in the practice of licensing a patent on condition that the licensee assign all improvement patents to the licensor. Conceivably the device could be employed with the purpose or effect of violating the anti-trust laws. He who acquires two patents acquires a double monopoly. As patents are added to patents a whole industry may be regimented. The owner of a basic patent might thus perpetuate his control over an industry long after the basic patent expired. Competitors might be eliminated and an industrial monopoly perfected and maintained. Through the use of patent pools or multiple licensing agreements the fruits of invention of an entire industry might be systematically funneled into the hands of the original patentee. See United Shoe Machinery Co. v. La Chapelle, 212 Mass. 467, 99 N.E. 289, Ann. Cas. 1913D 715 . . . Congress, however, had made no specific prohibition against conditioning a patent license on the assignment by the licensee of improvement patents. But that does not mean that the practice we have here has immunity under the anti-trust laws. Indeed, the recent case of Hardford-Empire Co. v. United States, 323 U.S. 386, 89 L.Ed. 322, 65 S.Ct. 373, 324 U.S. 570, 89 L.Ed. 1198, 65 S.Ct. 815, dramatically illustrates how the use of a condition or covenant in a patent license that the licensee will assign improvement patents may give rise to violations of the anti-trust laws.

"The District Court found no violation of the anti-trust laws in the present case. The Circuit Court of Appeals did not reach that question. Hence it, as well as any other questions which may have been preserved, are open on our remand of the cause to the Circuit Court of Appeals."

On remand, Judge L. Hand of the Court of Appeals for the Second Circuit found no anti-trust violations (161 F.2d 565) and said, at page 567:

> " . . . it is hornbook law that not every restraint of competition is 'unreasonable' and that only 'unreasonable' restraints are unlawful . . . upon the record as it comes to us, no restraint of trade appears — to say nothing of any 'unlawful' restraint."

Thus, the decision of this Court in the *"Transwrap"* Case establishes that a "grant-back" clause is not per se illegal, but it may constitute a restraint of trade where coupled with sufficient additional facts to show a pooling of patents for domination of a particular field or tend to create a monopoly, as found in the case of *Hartford-Empire Co. v. United States, supra.* The lengthy record in this case is entirely devoid of any basis for a finding of a tendency to create a monopoly in the field of two-way plows, particularly in view of the fact that the agreement in question was cancelled fourteen years ago. Accordingly, the present situation does not present a good case for this Court to review the possible effects of "grant-back" clauses in general. Furthermore, it is submitted that the present case does not present a clear cut issue for this Court to review its decision in the *"Transwrap"* Case, because of the cancellation of the subject agreement and the underlying finding by the lower courts of fraud committed by Petitioner.

In applying the Rule announced by this Court in the *Transwrap* case, the Court of Appeals for the Ninth Circuit in *Cutter Laboratories, Inc. v. Lyophile-Cryochem Corp.* (1949) 179 F.2d 80 said at page 92:

> " . . . Nor is an agreement to assign patents on future inventions within a specified field inherently

illegal. Transparent Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637, 67 S.Ct. 610, 91 L.Ed. 563. It is only where the agreements are used to effect a restraint of trade or a monopoly that they violate the law, as where they are used to *fix prices,* United States v. Line Material Co., 333 U.S. 287, 68 S.Ct. 550, 92 L.Ed. 701, or to *suppress competition from unpatented articles,* Morton Salt Co. v. Suppiger Co., 314 U.S. 488, 62 S.Ct. 402, 86 L.Ed. 363, or to *monopolize an entire industry* by pooling the dominating patents and allocating fields of manufacture among companies which would otherwise be in competition. Hartford-Empire Co. v. United States, 323 U.S. 386, 65 S.Ct. 373, 89 L.Ed. 322." (Emphasis added)

In the present case there is no evidence whatever that the Pursche-Atlas License Agreement was used to effect a restraint of trade or a monopoly, or that it was used to fix prices or to suppress competition from unpatented articles or to monopolize an entire industry.

(C) The Chandler Inventions are "Improvements".

The argument in the Petition beginning on page 9 is to the effect that the Chandler inventions covered by Patents 2,773,439, 2,817,241 and 2,842,038 are not improvements relating to two-way plows. The fallacy of that argument is plain from an inspection of the patents themselves (printed in the back of the Appendix to the Petition). Patent 2,773,439 states in its opening sentence that it is "concerned with a unique tail wheel construction for two-way type plows" and its claims all contain the requirement "In a two-way plow having a plow carrying frame supported for rotation from side to side on a sub-

stantially horizontal axis, a ground contacting wheel structure comprising . . ." Similarly, the Chandler patent 2,842,038 states in its opening sentence that it is "concerned with a novel tail wheel construction for plows, especially plows of the two-way type" and its claims all recite "In a two-way plow. . . " The Chandler patent 2,817,241 shows one form of rollover mechanism which was used to turn the plow carrier on certain Atlas two-way plows; the record fails to show that the device was ever used for anything else. It seems too clear for argument that these Chandler patents relate to improvements in two-way plows. As pointed out above, the "grant-back" clause provision in the *Transparent Wrap* case related to

> "all improvements to Transwrap Packaging Machines, or new inventions used or capable of use in connection therewith"

and under this language the Chandler inventions are certainly "new inventions used or capable of use in connection" with the plows disclosed in the Pursche Patent No. 2,625,090 (R1-1548).

The Petition is incorrect in asserting (page 9):

> ". . . The Court of Appeals in its first decision held invalid all of the combination claims which included a tail wheel (App., pp. 54a-57a). Tail wheels in combination with plows are not, therefore, the subject matter of Respondent's patent rights. . . . "

On the contrary, claims in Respondent's patents concerning tail wheels were held valid and infringed by the Court of Appeals in its first decision (Appendix to Petition, page 81a) and are not challenged here. These include claims 16 and 24 of Patent 2,625,090 and claim 16 of Patent 2,625,091. Petitioner concedes (page 21) that "The Transparent-Wrap doctrine is limited to 'improvement patents' . . .". Respondent points out that the

Chandler patents are in fact "improvement patents" under the Trans-Wrap doctrine. Whether the structures disclosed in the Chandler patents are infringements of the claims of the Pursche patents is immaterial; the language of the Trans-Wrap provision included "new inventions used or capable of use in connection therewith".

In urging that the *Transparent Wrap* case be reconsidered, Petitioner cites a number of cases decided by this Court, and lower Courts. However, each of the cases cited on pages 13-20 of the Petition can be readily distinguished. Thus *U.S. v. General Electric Company,* 80 F.Supp. 989, 1005, 1006 (S.D.N.Y., 1948) involved price-fixing arrangements, and in *U.S. v. General Electric Co.,* 82 F.Supp. 753 (D.N.J., 1949) there was a finding of specific intent of a licensing policy to perpetuate domination over the industry. In *U.S. v. National Lead Co., et al.,* 63 F.Supp. 513 (S.D.N.Y., 1945) there was a refusal to license which was the product of an agreement or conspiracy on the part of owners of competing patents. In *Cutter Laboratories v. Lyophile-Cryochem Corp.,* 179 F.2d 80 (9 Cir., 1949) the test announced by the Court does not adversely affect Respondent, as pointed out above. *Leitch Manufacturing Co. v. Barber Company,* 302 U.S. 458 (1937) condemned the extension of the patent monopoly to cover unpatented material. In *Ethyl Gasoline Corporation, et al v. United States,* 309 U.S. 436 (1940) regulation of prices was involved, and the same is true of *United States v. Masonite Corporation et al,* 316 U.S. 265 (1942). In *Morton Salt Co. v. Suppiger Co.,* 314 U.S. 488 (1942) a tie-in clause was involved which required the licensees to use only the unpatented salt tablets sold by the licensor. *Mercoid Corp. v. Mid-Continent Investment Co.,* 320 U.S. 661 (1944) related to enforcement of a patent against an unpatented element

of the combination claimed in the patent. In *Brulotte et al v. Thys Company*, 379 U.S. 29 (1965) this Court condemned a requirement for payment of royalties beyond the ends of the term of the patents. Pursche has not licensed anyone under the Chandler patents and his only license under his own patents is a non-exclusive license to one company (R1-1659). The same license has been offered to other plow manufacturers. No royalties are payable under any patent after it expires, and no "grant-back" provision is involved. From the foregoing brief review of the cases cited by Petitioner, it is clear that each of them condemned a practice not involved in the facts of the present case.

(D) The Fraud of Petitioner.

Chandler was an Engineer and Designer employed by Atlas (R1-84) during the period 1948-1952 while the license agreement (R1-1645) was in existence between Atlas and Pursche. Paragraph IX of that license agreement required Atlas to disclose to Pursche inventions which Atlas acquired relating to two-way plows, the subject matter of the license agreement. This was a reasonable requirement because Atlas had never built a two-way plow or any kind of plow prior to the license agreement (R1-74). However, in violation of this disclosure requirement, Atlas concealed from Pursche the fact that its employee Chandler had made inventions in two-way plows (R1-88), concealed from Pursche the fact that it caused patent applications on said inventions to be filed in the United States and in foreign countries at its own expense, concealed from Pursche its engineering design and development and the building and testing of two-way plows containing the Chandler inventions (R1-84-89). The trial court held that these acts of concealment by Petitioner Atlas were fraudulent, stating:

"The concealment from Harry A. Pursche by Atlas Scraper and Engineering Co. of said Roy L. Chandler inventions and the facts relevant to the making of said inventions was fraudulent, . . . " (R2-727)

As pointed out in a footnote in the second Appellate Decision, 357 F.2d 296, at page 299:

"At the hearing on Pursche's motion the trial judge stated in these words what he had meant by the decree:

"'It seemed to me when I signed the judgment that it would be unnecessary to use the additional language which you now seek to put in there, but it also seems to me — and I am frank to say so — that if Atlas is claiming any rights at all in the Chandler patents, that they lost by virtue of the judgment in this case. * * * Whatever they acquired in the Chandler patents was acquired wrongfully and by fraud and they belonged to Pursche. Now if you have to use different language than I used before to spell that out, I think this should be done.'"

The order of the trial court (R2-939, 940) contains the following statement:

"As to the second ground (Anti-trust violation), it would be odd indeed if Atlas, adjudged guilty of Fraud, could use the Anti-trust laws to protect it in the exercise of that fraud. The Anti-trust laws were made to prevent fraud, not enhance and protect it."

(E) The Anti-Trust Issue Was Raised Too Late.

The Complaint in this case was filed November 3, 1953, after the Pursche-Atlas License Agreement had been cancelled by Atlas. *Ten years* after the Complaint was filed, Atlas for the first time advanced a contention that

Paragraph IX of that license agreement constituted a violation of the Anti-Trust Laws and a misuse of the Pursche patents (R2-760). This contention was first raised by Atlas after the first decision on appeal (300 F.2d 467, 1961) and after the first Petition for a Writ of Certiorari had been denied by this Court in 1963 (371 U.S. 911). In the second appellate decision, the Court of Appeals for the Ninth Circuit held:

> "Nor did the trial court err in refusing to deny Pursche all relief on the ground that he, Pursche, had misused his own patents to violate the antitrust laws. This was a defense. But Atlas did not assert it until after the remittitur on the affirmance of the judgment. At that stage such a motion was improper and, if granted, would have constituted a clear violation of that court's duty to carry out the mandate." (357 F.2d 296, 298, February 28, 1966)

The factual situation regarding Paragraph IX of the license agreement was before the trial court, the Court of Appeals in its first decision, and before this Court in the first Petition for Certiorari, although presented on another theory of law.

Under these circumstances the Anti-Trust and misuse charges came too late. *Stiegele v. J. M. Moore Import-Export Co.* (312 F.2d 588, Second Circuit 1963). In that case the Court refused to follow the *Frank Adam Electric Co.* case, relied upon by Petitioner, and held to the contrary. The Court said, at pages 594, 595:

> "With respect to the antitrust defense, the defendants assert that the effect of 35 U.S.C. § 282, is to require a court to grant leave at any time, however late in the proceedings, to plead the defense that the plaintiffs have violated the antitrust laws. Section 282 requires that the defense of unenforceability

be pleaded; the defendants concede that this requirement applies to the defense which they seek to raise. They argue, however, that the statute must be construed in the light of the rule that the admissibility of evidence pertaining to patent misuse, which is essentially an 'unclean hands' defense, 'does not depend upon the diligence or want of diligence of a party to the case,' Frank Adam Electric Co. v. Westinghouse Electric & Mfg. Co., 146 F.2d 165, 167 (8 Cir. 1945), but rather pertains to the public interest and the integrity of the court and may be taken up at any time. See Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp., 154 F.2d 814 (2 Cir.), cert. denied, 328 U.S. 859, 66 S.Ct. 1353, 90 L.Ed. 1630 (1946); Gynex Corp. v. Dilex Institute of Feminine Hygiene, Inc., 85 F.2d 103, 106 (2 Cir. 1936); General Industries Co. v. Birmingham Sound Reproducers, Ltd., 194 F.Supp. 693 (E.D.N.Y. 1961). Therefore, the defendants argue, the effect of § 282 'is to require that leave should be given a party to plead the defense formally at any stage of the case.' Appellants' Brief, p. 77.

"We think that the defendants' position cannot be sustained. Suits for patent infringement are peculiarly affected with a public interest and in such suits the proper application of the doctrine of unclean hands 'not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public.' Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 815, 65 S.Ct. 993, 997, 89 L.Ed. 1381 (1945). But it does not follow from the fact that a court may freely grant leave to plead and prove the defense of unclean hands in order to avoid assisting a wrongdoer or to protect the public that it may never deny leave to raise this defense no matter what the cir-

cumstances. The chancellor's conscience and the public interest are better protected by the provisions of Rule 15, Federal Rules of Civil Procedure, which directs the court to grant leave to amend pleadings 'when justice so requires' than by the rigid rule for which the defendants contend, that the defense of antitrust violations may be raised at any time whatever, even at trial, although the plaintiff may have had no notice that he would be required to defend against such a charge and the defendant has given no explanation of his delay in asserting the defense. The special nature of the defense of unclean hands should lead courts to grant leave to amend pleadings in this respect more freely than is usually the case; and we do not say that under § 282 a court may not in appropriate circumstances deny relief on the ground of unclean hands even in the absence of pleadings. But in the light of all the circumstances of this case, particularly the *defendants' inadequately explained delay in proffering the antitrust defense,* we think that the district judge did not abuse his discretion in denying the motion to amend." (Emphasis added.)

The present litigation between Pursche and Atlas has been pending for almost thirteen years. In the language of the *Stiegele* case quoted above, Atlas' inadequately explained delay in proffering the antitrust defense is more than sufficient grounds for denying the present Petition.

The effects of the fraud of Petitioner Atlas upon Respondent Pursche and upon Chandler have been relieved by a recent agreement between Pursche and Chandler under which they will share on a 50-50 basis any royalties received by licensing of the Chandler patents to manufacturers of two-way plows.

Conclusion.

If the *Transwrap* case is to be distinguished or modified, as suggested on page 15 of the Petition, the present case appears to be a very poor vehicle for that purpose. Petitioner has been adjudged guilty of Fraud, sustained on Appeal, and not challenged here. Because of the Fraud practiced by Petitioner on Respondent, the Appellate Court in its second decision affirmed the Order by the trial Judge requiring Petitioner Atlas to assign its exclusive license under the Chandler patents to Respondent Pursche. Moreover, the "grant-back" clause challenged by Petitioner appeared in its own license agreement with Respondent, which agreement it cancelled fourteen years ago. Although the facts of that license agreement have been before the Court since 1953, when the present case was filed, and were before this Court in the earlier Petition for Certiorari, (on another theory of law), denied November 19, 1962, 371 U.S. 911, the charge of violation of the Anti-Trust Laws was first raised ten years after filing of the Complaint. Significantly, there is nothing in the record to show that the "grant-back" provision ever had any restrictive effect on the industry, and there is no record of fixing prices, tie-in clauses, suppressing competition, or monopolizing an industry.

The Petition for Certiorari should be denied.

Respectfully submitted,

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